ATTORNEY FOR APPELLANT:

ARVIL R. HOWE
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MAUREEN ANN BARTOLO
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ROBERT ROGERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A04-0703-CR-127
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause Nos. 71D03-0411-FB-162 and 71D03-0411-FA-106

July 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Robert Rogers appeals his convictions for Sexual Misconduct with a Minor, both as Class B felonies, following a jury trial. He presents two issues for our review:

1. Whether the trial court committed fundamental error by joining his two charges for trial.

2. Whether the court improperly imposed consecutive sentences because of the joinder.

We affirm.

FACTS AND PROCEDURAL HISTORY

Lisa Palmer and her seven year old daughter, A.P., moved in with Rogers. Eventually, Rogers' two daughters, D.S. and A.R., moved in with Rogers, Lisa and A.P. A.R. and A.P. were almost the same age and became very close friends. D.S. was approximately two years older. After Lisa and A.P. moved out of the house, A.R. and A.P. continued to spend a lot of time together and often slept over at each other's homes.

In August 2004, when A.P. was fourteen, she spent the weekend at Rogers' home. On that Saturday night, D.S., A.R., and A.P. were all at Rogers' house and entertained friends. After the friends left, Rogers called A.P. into his bedroom. He locked the door from the inside and threatened to tell Lisa that A.P. was spending time with a girl that Lisa did not like unless A.P. would let him "go down on" her. Transcript at 61. A.P. initially refused, but when Rogers picked up the phone and said he was calling Lisa, A.P. agreed. Rogers put A.P. on the bed and took off her pajama bottoms, and then he put his mouth on her vagina. After she left Rogers' bedroom, A.P. told both A.R. and D.S. what

Rogers had done. The three girls slept in D.S.'s bed that night to protect each other. A.P. did not tell any adults.

In September 2004, Rogers and A.R. were home alone. A.R. was fifteen years old at this time. Rogers called A.R. into his bedroom and took off her clothes. He then put his penis in her vagina. A.R. told D.S. and A.P., but she told no adults because Rogers said that he would kill her if she told anyone.

Within a couple of days, D.S. told one of her best friends, A.M., what A.R. said Rogers did. A.R. and A.M. were in a class together in school, and A.M. wrote a note to A.R. asking what had happened. A.R. told A.M., and A.M. took A.R. to the school counselor's office where A.R. also told the school counselor. The authorities were contacted, and A.R. gave a statement to a forensic interviewer. Based on A.R.'s statement, the authorities contacted Lisa and A.P. A.P. gave a statement to the same forensic interviewer the following day.

In November 2004, the State charged Rogers with three crimes: Child Molesting as a Class A felony, based on allegations that Rogers had sexual intercourse with A.R. when she was thirteen years old; and sexual misconduct with a minor, as a Class B felony, for his conduct in September against A.R. in one case. In a separate case, the State charged Rogers with sexual misconduct with a minor, as a Class B felony, for his conduct in August against A.P.

The State moved to consolidate the cases for trial during a pre-trial conference on May 5, 2006. Rogers was not in attendance, but his trial counsel did not object. Rather, she agreed that the cases were factually intertwined. Because trial counsel had not

discussed consolidation with Rogers, the court took the State's motion under advisement and gave Rogers ten days to object in writing. At another pre-trial conference on August 31, trial counsel confirmed that Rogers had no objection to the consolidation.

Rogers' jury trial started on September 18, 2006. His theory of defense was that all three girls, A.P., A.R., and D.S., were angry at him so they made up the allegations. The jury acquitted Rogers on the child molesting charge, but it convicted Rogers on both charges of sexual misconduct with a minor.

On October 17, the court held the sentencing hearing. The court sentenced Rogers to twenty years for sexual misconduct with a minor, as a Class B felony, for Rogers' conduct against A.R. The court sentenced Rogers to fifteen years for sexual misconduct with a minor, as a Class B felony, for Rogers' conduct against A.P. The Court ordered Rogers to serve the sentences consecutively for an aggregate sentence of thirty-five years. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Joinder

Rogers claims that the court committed fundamental error by joining the two cases. Rogers acknowledges that he did not object, but he argues "this failure to object constitutes fundamental error." Appellant's Brief at 5. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). This exception applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is

substantial, and the resulting error denies the defendant fundamental due process. Burnside v. State, 858 N.E.2d 232, 241 (Ind. Ct. App. 2006).

Here, four months before trial, the State orally moved to consolidate Rogers' cases because "[t]he cases are factually very intertwined." Appellant's App. at 47. Rogers was not present at this hearing, but trial counsel stated that they "had no problem with [the consolidation] because Mr. Rogers wants to get these trials over with." Appellant's App. at 47. She also agreed that the cases were factually intertwined in response to the court's question. The court took the motion to consolidate under advisement so that trial counsel could consult with Rogers. During a subsequent pre-trial conference, trial counsel explained that Rogers deliberately refrained from objecting because "[h]e wanted to get it over with." Appellant's App. at 49.

Rogers did more than simply fail to object, he acquiesced in the State's motion. Thus, if there is error, he invited it. Rogers cannot invite error and then request appellate relief upon such error. Kelnhofer v. State, 857 N.E.2d 1022, 1024 (Ind. Ct. App. 2006). Generally, an invited error is not subject to review, but we may choose to determine whether an invited error was fundamental error. Dickenson v. State, 835 N.E.2d 542, 556 n.4 (Ind. Ct. App. 2005). We choose to review this claim.

Indiana Code Section 35-34-1-9, which authorizes the joinder of charges, reads, in pertinent part:

> Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:
>
> > (1) are of the same or similar character, even if not part of a single scheme or plan; or

> (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Ind. Code § 35-34-1-9(a) (2004). Indiana Code Section 35-34-1-11(a) entitles a defendant to severance of the charges when they "have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character." I.C. § 35-34-1-11(a) (emphasis added). See also Blanchard v. State, 802 N.E.2d 14, 25 (Ind. Ct. App. 2004).

In this case, there were three separate charges for sexual crimes, two against A.R., which were originally charged together, and the third against A.P. The investigation into the crimes against A.R. led to the discovery of the crime against A.P. because A.P. did not report Rogers' crime against her until A.R. identified A.P. as a potential victim. Rogers committed his crimes within weeks of each other and at the same location, Rogers' locked bedroom. Further, A.R. was present at Rogers' home when he committed his crime against A.P. and, consequently, she was a witness for the State charge for Rogers' conduct against A.P. D.S. was also a State's witness in both cases because she was in Rogers' home the night he committed his crime against A.P. and D.S. was directly involved in A.R.'s disclosure. Although Rogers' charges were of the same character, they were also factually connected. Therefore, Rogers would not have been entitled to severance of the charges. See Blanchard, 802 N.E.2d at 25.

In situations where the defendant is not entitled to severance, the trial court is required to grant a severance motion only if it "determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense."

I.C. § 35-34-1-11(a). The court is to consider: "(1) the number of offenses charged; (2) the complexity of the evidence to be offered; and (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense." Id. On appeal, the court's decision on a severance motion is reviewed for an abuse of its discretion. Waldon v. State, 829 N.E.2d 168, 175 (Ind. Ct. App. 2005), trans. denied. To prove an abuse of the court's discretion, Rogers must show that he was prejudiced in light of what actually occurred at trial. Id.

In this case, there were only three charges, and the evidence was not complex. All the evidence to support Rogers' crimes came from the victims' testimony, and both victims identified him during trial. Rogers cannot show that either the number of charges or the complexity of the evidence made joinder inappropriate.

Also, Rogers can show no prejudice in light of what happened at his trial. Rogers' theory of defense was that all three girls, A.P., A.R., and D.S., were angry with him so they fabricated their stories. Trial counsel used inconsistencies between the girls' testimony to support this theory. The jury acquitted Rogers of one of the three charges, which demonstrates that the jury was able to distinguish the evidence and apply the law to each offense. See Waldon, 829 N.E.2d at 175.

Contrary to Rogers' argument, his case is not like Wilkerson v. State, 728 N.E.2d 239 (Ind. Ct. App. 2000). First, that case was in a different procedural posture. Wilkerson was an appeal from the denial of a petition for post-conviction relief. Id. at 242. We reversed the convictions based on ineffective assistance of trial counsel. Id. Second, that case is factually distinguishable.

> Here, the connection between the two crimes at issue is limited. Both are sex crimes that occurred in Anderson, Indiana; however, they occurred three weeks apart, at different times of the day, at different locations, to different victims. Further, different weapons were used and one victim was robbed while the other was not. The assault on T.S. occurred on July 8, 1985, at 1:00 a.m. . . . T.S. was unable to identify her attacker. The assault on A.W. occurred at approximately 10:30 p.m. on July 25, 1985. . . A.W. identified Wilkerson as the man who raped her.

Id. at 247. Finally, the prejudice requiring reversal in that case was the fact that under the sentencing statutes in place at the time of Wilkerson's crimes—1985—he could not have been sentenced to consecutive terms if he had been tried separately. Id. at 249.

The sentencing statutes in effect when Rogers committed his crimes authorized the court to impose consecutive sentences "even if the sentences are not imposed at the same time." I.C. § 35-50-1-2(c). Thus, he could have received the same sentence even if his charges had been tried separately. Again, Rogers never filed a motion to sever, and he virtually joined the State's motion to consolidate. The court did not commit fundamental error by permitting joinder in this case. [1]

Issue Two: Consecutive Sentences

Rogers contends that "[t]he trial court erred in sentencing the Defendant in two separate crimes to consecutive sentences that did not arise out of a single criminal episode." Appellant's Brief at 6. A trial court cannot order consecutive sentences in the absence of express statutory authority. Reed v. State, 856 N.E.2d 1189, (Ind. 2006). But

[1] The State contends that "Defendant also appears to obliquely allege ineffective assistance of counsel." Appellee's Brief at 7. But Rogers did not. Rather, he states, "If this Court were to conclude [ineffective assistance of counsel] is a viable argument given the unclear citation in the Chronological Case Summary made by the court reporter, Rogers will seek an Appellate Rule 37 remand to reflect the proper procedural posture." Appellant's Brief at 6. Because the issue of ineffective assistance was neither presented nor argued, we will not review whether trial counsel was ineffective.

Rogers' argument misreads the consecutive sentencing statute, Indiana Code Section 35-50-1-2.

As noted above, that statute allows the court to order a defendant to serve his sentences consecutively "even if the sentences are not imposed at the same time." I.C. § 35-50-1-2(c). The limitation on the court's ability to impose consecutive sentences applies only to "felony convictions arising out of an episode of criminal conduct." I.C. § 35-50-1-2(c). Rogers acknowledges that his crimes arose out of two different episodes, and he does not challenge his sentence on any other grounds. Because it was statutorily authorized to impose consecutive sentences, the court committed no error when it did so.

Affirmed.

MATHIAS, J., and BAILEY, J., concur.